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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN MATHEW LONKEY,)	
)	No. 44256
Petitioner-Appellant,)	
)	Owyhee County Case No.
v.)	CV-2015-783
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF OWYHEE**

HONORABLE CHRISTOPHER S. NYE
District Judge

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PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

John Mathew Lonkey appeals *pro se* from the district court's judgment dismissing his post-conviction petition.

Statement Of Facts And Course Of Proceedings

In Lonkey's underlying criminal case, the state charged Lonkey with rape, burglary, use of a deadly weapon during the commission of a crime, and interference with a telephonic communication instrument. (See R., p.25; State v. Lonkey, Docket No. 41835, 2015 Unpublished Opinion No. 316 at 2 (Idaho App. Jan. 22, 2015).) Pursuant to a plea agreement, Lonkey pled guilty to rape and burglary and the state dismissed the remaining charges. (Id.) The state also agreed to "recommend concurrent sentences of no more than forty years in aggregate," and "Lonkey was free to argue for less." Lonkey at 2. Consistent with the agreement, the state "requested the imposition of an aggregate forty-year unified sentence, with twenty years determinate"; Lonkey requested a cumulative 15-year sentence, with five years fixed. Lonkey at 2. The court imposed a unified life sentence with 25 years fixed for rape and a concurrent 10-year sentence with five years fixed for burglary. (See R., p.26.)

On direct appeal, Lonkey asserted the prosecutor breached the plea agreement, and that "the district court abused its discretion by imposing an excessive aggregate sentence." Lonkey at 2. The Idaho Court of Appeals rejected both arguments and affirmed Lonkey's convictions and sentences. See generally Lonkey, supra.

Lonkey filed a timely *pro se* petition for post-conviction relief asserting, as he did on direct appeal, that the prosecutor breached the plea agreement and that his sentences are excessive. (R., pp.4-7.) Lonkey also filed a motion for appointment of counsel, which the district court granted; attorney Michael Nelson represented Lonkey on his petition. (R., pp.9-11, 20, 24.) After appointing counsel, the district court issued a notice of intent to dismiss advising Lonkey of its intent to dismiss his petition on the grounds that the claims in Lonkey's petition are barred by the doctrine of *res judicata* because Lonkey raised the same claims on direct appeal. (R., pp.28-29.) At a subsequent status conference, post-conviction counsel advised the court that there would be no further supplementation to Lonkey's *pro se* petition (R., p.35), and the court dismissed Lonkey's petition on the basis set forth in its notice (R., pp.36-37, 39). Although Lonkey's notice of appeal was not timely filed from the judgment dismissing his petition, his appeal was deemed timely based on the "mailbox rule." (R., pp.39, 41-44; Order Conditionally Dismissing Appeal, dated June 20, 2016; Response to Conditional Dismissal, dated July 6, 2016, Order Withdrawing Conditional Dismissal, dated July 20, 2016.)

The district court granted Lonkey's request to appoint counsel to represent him on appeal (R., pp.45-47, 57-58); however, appellate counsel was allowed to withdraw after notifying the Court that "three attorneys determined that the appeal failed to present any meritorious issues for review" (Motion for Leave to Withdraw and Motion to Suspend the Briefing Schedule, dated December 29, 2016; Affidavit in Support of Motion for Leave to Withdraw and Motion to

Suspend the Briefing Schedule, dated December 29, 2016; Order Granting Motion to Withdraw as Counsel, dated January 19, 2017).

ISSUE

Lonkey states the issue on appeal as:

Will the Idaho Court of Appeals find that Public Deffender [sic] Mike Nelson was ineffective in his duties as a public deffender [sic][?]

(Appellant's Brief, p.5.)

The state rephrases the issue on appeal as:

Has Lonkey failed to meet his burden of showing error in the district court's summary dismissal of his post-conviction petition?

ARGUMENT

Lonkey Has Failed To Show Error In The Summary Dismissal Of His Petition

A. Introduction

The district court summarily dismissed Lonkey's post-conviction petition because the only claims in Lonkey's petition are barred by *res judicata*. (R., pp.25-29, 36-37.) On appeal, Lonkey does not challenge the district court's dismissal decision, but instead he asks this Court to find that his post-conviction counsel was ineffective. (Appellant's Brief, pp.5-7.) Because Lonkey's only complaint is not properly before the Court, Lonkey has failed to show any basis for reversing the district court's decision summarily dismissing his petition.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Lonkey Has Failed To Show Any Error In The Summary Dismissal Of His Petition

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace,

140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

The only claims raised in Lonkey’s post-conviction petition are the same claims he raised on direct appeal. (Compare R., p.5 with Lonkey, 2015 Unpublished Opinion No. 316.) The district court dismissed these claims on the basis that they are barred by the doctrine of *res judicata*. (R., pp.25-29, 36-37.) The district court’s dismissal decision was correct. See Severson v. State, 159 Idaho 517, 521-522, 363 P.3d 358, 362-363 (2015) (applying *res judicata* principles in affirming dismissal of claims litigated on appeal). Lonkey does not claim otherwise. Rather, Lonkey complains that his post-conviction attorney, Michael Nelson, was ineffective because Nelson allegedly “did not file or attempt to call or answer the phone at all.”¹ (R., pp.4, 6.) Lonkey’s complaint is not properly before the Court.

¹ At the first status conference, Nelson advised the court that he had requested records from the State Appellate Public Defender in order to determine whether an amended petition would be appropriate, and Nelson asked the court for 30 days to complete that review. (Tr., p.4, L.17 – p.5, L.6, p.6, Ls.1-4.) Nelson also represented that Lonkey “call[ed] [him] multiple times a week.” (Tr., p.5, L.24.) At the second status conference, “Nelson advised the Court that he had reviewed the pleadings and spoken with [Lonkey] and there was nothing to further supplement the petition.” (R., p.35.)

It is a fundamental tenet of appellate law that claims will not be considered for the first time on appeal. See State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010); see also State v. Manzanares, 152 Idaho 410, 420, 272 P.3d 382, 392 (2012) (declining to review an issue where there was no adverse ruling by the district court). This principle applies to post-conviction claims not alleged in a petition, but presented for the first time on appeal from the denial of post-conviction relief. Fairchild v. State, 128 Idaho 311, 318, 912 P.2d 679, 686 (Ct. App. 1996) (declining to address post-conviction claim raised for the first time on appeal). Because Lonkey's post-conviction petition did not allege that his post-conviction attorney was ineffective (nor could it), this Court may not consider Lonkey's complaint about counsel for the first time on appeal. See id. Moreover, because Lonkey does not challenge the actual basis for the dismissal of his post-conviction petition, he has failed to show any error entitling him to relief. State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a ruling by a district court is unchallenged on appeal, appellate court will affirm on the unchallenged basis).

CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon the district court's order dismissing Lonkey's petition for post-conviction relief.

DATED this 11th day of April, 2017.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 11th day of April, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JOHN MATHEW LONKEY
IDOC #110008
I.S.C.C.
P. O. BOX 70010
BOISE, ID 83707

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

JML/dd